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2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF OREGON
5 PORTLAND DIVISION
6

7 CHARLES W. MILLER,)
8)
9 Plaintiff,) No. 03:10-cv-00376-HU
10 vs.)
11 J.E. THOMAS, Warden, FCI Sheridan;) FINDINGS & RECOMMENDATION
12 and DOES 1-3;) ON MOTION TO DISMISS
13 Defendants.)
14

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1 HUBEL, M.J.:

2 This matter is before the court on the defendants' motion
3 (Dkt. #41) to dismiss the plaintiff's First Amended Complaint (Dkt.
4 #40). The factual and procedural background of this case are well
5 known to the court, so I only provide a brief summary here. On
6 October 31, 2008, I granted the plaintiff Charles W. Miller's
7 application for a writ of *habeas corpus* pursuant to 28 U.S.C.
8 § 2241. See *Miller v. Thomas*, No. CV-08-789-HU, 2008 WL 4793035
9 (D. Or. Oct. 31, 2008). On December 20, 2004, Miller was sentenced
10 by the Honorable Robert H. Whaley of the United States District
11 Court for the Eastern District of Washington, to 24 months' impri-
12 sonment upon revocation of Miller's federal term of supervised
13 release ("TSR"). *Id.* In a nutshell, I found the Bureau of Prisons
14 ("BOP") acted arbitrarily in failing to designate the place of
15 Miller's imprisonment as a Washington State correctional facility
16 to effect the intent of the sentence imposed by Judge Whaley. Had
17 the BOP acted appropriately, Miller would have been released from
18 prison no later than April 23, 2008. See *id.*; *cf.* Dkt. #2-8
19 (claiming his release date should have been April 7, 2008).
20 Instead, due to the BOP's error, Miller was not released until
21 November 7, 2008.

22 On December 4, 2009, Miller filed a notice of tort claim with
23 the BOP alleging "financial earnings, emotional distress and family
24 hardship was [sic] suffered from the . . . wrongful imprisonment
25 that B.O.P. staff knew about, but hindered at every chance." Dkt.
26 #2-8, p. 1. Miller requested \$450,000 in damages for "personal
27 injury." *Id.*; Dkt. #2, ¶ 26. When his claim went unanswered for
28

1 "over 90 days," Miller filed the instant action for damages. See
2 Dkt. #2.

3 The Defendants moved to dismiss Miller's original Complaint.
4 On February 22, 2012, I submitted Findings and Recommendation, in
5 which I recommended the motion be granted in part and denied in
6 part. Dkt. #39. Specifically, I found Miller had alleged facts
7 sufficient to excuse the exhaustion requirement of the Prison
8 Litigation Reform Act; none of the Defendants was entitled to
9 qualified immunity; Miller could maintain a *Bivens*-type action¹
10 without calling into question the sentence imposed, or extending
11 *Bivens* into a new type of action; the Defendant Cheryl Pauley had
12 not been served properly and should be dismissed from the case; and
13 Miller's claim for injunctive relief was moot. See *id.*

14 On May 23, 2012, District Judge Michael Mosman adopted my
15 recommendations in part. Dkt. #39. Where Judge Mosman diverged
16 from my findings was with regard to Warden Thomas's immunity.
17 Judge Mosman found Warden Thomas was entitled to qualified immuni-
18 ty, "to the extent [Miller was] arguing that the warden had a duty
19 to investigate [Miller's] allegation of overdetention based solely
20 on his informal verbal complaint." *Id.*, p. 6. Judge Mosman
21 directed Miller to file an amended complaint, if Miller felt he was
22 "able to sufficiently plead some factual basis under *Iqbal/Twombly*"²

25 ¹Referring to *Bivens v. Six Unknown Named Agents of the*
26 *Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29
L. Ed. 2d 619 (1971).

27 ²Referring to *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct.
28 1937, 173 L. Ed. 2d 868 (2009); and *Bell Atlantic Corp. v. Twombly*,
550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

1 for imputing the actions of Does 1-3 to Warden Thomas." *Id.*,
2 pp. 6-7.

3 Miller filed his First Amended Complaint on June 13, 2012.
4 Dkt. #40. In the amended pleading, Miller asserts the following
5 claims for relief:

6 ▶ The defendants violated Miller's fourteenth amendment rights
7 to liberty and equal protection by refusing to release him on
8 time, "with blatant and total disregard for the law [the
9 defendants] are sworn to uphold." Dkt. #40, ¶ 21.

10 ▶ The defendants were deliberately indifferent to Miller's right
11 to have his sentence calculated pursuant to B.O.P. policy.
12 *Id.*, ¶ 23.

13 ▶ The defendants violated Miller's eighth amendment "right
14 against excessive punishment," rendering the defendants
15 "liable under 42 U.S.C. § 1983 because of [Miller's] excessive
16 punishment[.]" *Id.*, ¶ 25.

17 ▶ The defendants "are liable under 42 U.S.C. § 1983 because
18 officials' conduct goes beyond mere negligence." *Id.*, ¶ 26.

19 ▶ The defendants are liable under section 1983 because they kept
20 Miller "in custody beyond term of his commitment[.]" *Id.*,
21 ¶ 28.

22 ▶ The defendants failed or refused to act, "or took only
23 ineffectual action," despite knowing or having reason to know
24 Miller's sentence had been calculated incorrectly. *Id.*,
25 ¶¶ 29-31.

26 ▶ The defendants "violated Miller's right to redress . . . under
27 the First Amendment to the United States Constitution." *Id.*,
28 ¶ 33.

1 The defendants' actions "inflicted emotional distress on . . .
2 Miller." *Id.*, ¶ 35.

3 For all of these alleged wrongs, Miller seeks compensatory damages
4 ("including economic and non-economic damages") in the amount of
5 \$450,000; punitive damages; and his attorney's fees and costs.
6 *Id.*, p. 9. The defendants have filed a motion to dismiss Miller's
7 Amended Complaint, and a supporting memorandum. Dkt. ##41 & 42.

8
9 **1. Motion to dismiss as to Warden Thomas**

10 Warden Thomas argues Miller's new allegations against him,
11 even if taken as true, fail to state a valid claim against him.
12 Thomas construes Miller's allegations as an attempt to hold Thomas
13 vicariously liable for the actions of Does 1-3. He notes
14 "'vicarious liability is inapplicable to *Bivens* and § 1983 suits,'"
15 and Miller has failed to plead that Thomas, himself, violated the
16 Constitution. Dkt. #42, p. 4 (quoting *Ashcroft v. Iqbal*, 556 U.S.
17 662, 676, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868 (2009)). Thomas
18 further argues that even if he knew Miller had lodged written
19 complaints about his sentence calculation, that knowledge alone is
20 not enough to impose *Bivens* liability on him. *Id.* (citing *Iqbal*,
21 556 U.S. at 677, 129 S. Ct. at 1949: "In the context of determining
22 whether there is a violation of clearly established right to
23 overcome qualified immunity, purpose rather than knowledge is
24 required to impose *Bivens* liability on the subordinate for
25 unconstitutional discrimination; the same holds true for an
26 official charged with violations arising from his or her
27 superintendent responsibilities.").

1 In response, Miller agrees "that *respondeat superior* does not
 2 trigger *Bivens* claim liability[,] " but he asserts his *Bivens* claim
 3 is not based on a *respondeat superior* analysis. Dkt. #43, p. 1.
 4 Miller's entire argument is set forth in two sentences, to-wit:
 5 "Here, plaintiff expects to show, after fact discovery, that defen-
 6 dant Thomas was personally involved in the unconstitutional
 7 conduct. This is more than awareness; it is personal and individu-
 8 al participation and will give rise to *Bivens* liability." *Id.*,
 9 p. 2.

10 Thomas argues Miller is seeking to engage in a fishing expedi-
 11 tion in the hope that he will uncover some facts that will
 12 establish Thomas's individual liability. Dkt. #44, p. 2. However,
 13 even the liberal pleading standard established by Federal Rule of
 14 Civil Procedure 8 "demands more than an unadorned, the-defendant-
 15 unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678, 129 S.
 16 Ct. at 1949. The Supreme Court expounded further on Rule 8's
 17 requirements, holding as follows:

18 A pleading that offers "labels and conclu-
 19 sions" or "a formulaic recitation of the
 20 elements of a cause of action will not do."
 21 . . . Nor does a complaint suffice if it ten-
 22 ders "naked assertion[s]" devoid of "further
 23 factual enhancement." [Citations omitted.]

24 To survive a motion to dismiss, a com-
 25 plaint must contain sufficient factual matter,
 26 accepted as true, to "state a claim to relief
 27 that is plausible on its face." . . . A claim
 28 has facial plausibility when the plaintiff
 pleads factual content that allows the court
 to draw the reasonable inference that the
 defendant is liable for the misconduct
 alleged. . . . The plausibility standard is
 not akin to a "probability requirement," but
 it asks for more than a sheer possibility that
 a defendant has acted unlawfully. . . . Where
 a complaint pleads facts that are "merely
 consistent with" a defendant's liability, it

1 "stops short of the line between possibility
2 and plausibility of 'entitlement to relief.'"
[Citations omitted.]

3 *Id.* The *Iqbal* Court further noted that while "Rule 8 marks a
4 notable and generous departure from the hyper-technical, code-
5 pleading regime of a prior era, . . . it does not unlock the doors
6 of discovery for a plaintiff armed with nothing more than
7 conclusions." *Id.*, 556 U.S. at 678-79, 129 S. Ct. at 1950.

8 Miller has failed to allege a sufficient factual basis to
9 support liability against Warden Thomas. Miller's allegation that,
10 "[u]pon information and belief, defendant Thomas knew around the
11 summer of 2008 that plaintiff Miller had made written objections to
12 the incorrect sentence, using forms and the system for submission
13 of the forms as set up by the prison," Dkt. #40, p. 5, does not
14 come close to alleging facts "that would allow a court to draw a
15 reasonable inference that a reasonable supervisor in [Thomas's
16 position] would have found the[] conduct [of Does 1-3] to be
17 clearly unlawful." *Chavez v. United States*, 583 F.3d 1102, 1110
18 (9th Cir. 2012) (refusing to impute liability to supervisors who
19 allegedly allowed subordinate Border Patrol officers to stop
20 vehicles in violation of fourth amendment); see Dkt. #39, at p. 6
21 (finding "it was not 'sufficiently clear' that Warden Thomas had a
22 duty to investigate [Miller's] claim such that a reasonable officer
23 would understand that his failure to do so in the circumstances
24 would have violated [Miller's] constitutional rights.").

25 Miller's bare-bones allegation that, upon Miller's "informa-
26 tion and belief," Thomas knew Miller was contesting the calculation
27 of his sentence and failed to take appropriate action, is not
28 enough, under *Iqbal*, to impute the liability of Does 1-3 to Warden

1 Thomas. Accordingly, Warden Thomas is entitled to qualified
2 immunity in this case.

3
4 **2. Motion to dismiss as to Does 1-3**

5 The defendants also argue Miller has failed to allege
6 sufficient facts to maintain an action against Does 1-3. Dkt. #42,
7 pp. 3, 5-6. The defendants assert Miller has failed to provide
8 "identifying information which would allow the United States an
9 opportunity through which discovery would reveal their identifies
10 [sic]." Dkt. #42. The defendants rely on *Gillespie v. Civiletti*,
11 629 F.2d 637 (9th Cir. 1980), where the court held:

12 As a general rule, the use of "John Doe"
13 to identify a defendant is not favored. . . .
14 However, situations arise, such as the
15 present, where the identity of alleged defen-
16 dants will not be known prior to the filing of
17 a complaint. In such circumstances, the
18 plaintiff should be given an opportunity
19 through discovery to identify the unknown
20 defendants, unless it is clear that discovery
21 would not uncover the identities, or that the
22 complaint would be dismissed on other grounds.

18 *Gillespie*, 629 F.3d at 642. Here, the defendants argue "the
19 complaint would be dismissed on other grounds," because Miller
20 "received redress through his prior Habeas Corpus Petition filed
21 with this Court." Dkt. #42, p. 5. The defendants assert that
22 because an alternative remedy was available, and was granted, "no
23 further inquiry should be afforded [Miller], even where Congress
24 has not provided for monetary damages through the Habeas process."
25 *Id.*, pp. 5-6 (citing *Mirmehdi v. United States*, 662 F.3d 1073, 1079
26 (9th Cir. 2011) "(holding that a *Bivens* remedy did not exist for
27 unlawful detention of aliens)").

1 Miller only response to this argument is his assertion that he
2 "is not able to plead some allegations beyond knowledge and
3 belief." Dkt. #43, p. 1.

4 I addressed this argument, to some extent, in my prior
5 Findings and Recommendation, noting:

6 The courts have recognized the viability
7 of a *Bivens* action for damages for extending
8 incarceration beyond the proper release date;
9 i.e., where it is not the sentence itself, but
10 the calculation of the sentence thereafter,
11 that is declared invalid. See *Whitehurst v.*
12 *Jones*, 278 Fed. Appx. 362, 363 (5th Cir. 2008)
13 (holding plaintiff had to exhaust habeas reme-
14 dies before pursuing *Bivens* claim; *Bivens*
15 action does not accrue until order is entered
16 invalidating detention past accurately-calcu-
17 lated release date); *Clemente v. Allen*, 120
18 F.3d 703, 705 (7th Cir. 1997) (once plaintiff
19 "succeeds in his habeas petition challenging
20 the computation and duration of his sentence,"
a *Bivens* action may accrue); *Alexander v.*
Perrill, 916 F.2d 1392 (9th Cir. 1990) (*Bivens*
action for damages due to miscalculation of
sentence; qualified immunity denied); cf., in
the context of 1983 actions, *Russell v. Lazar*,
300 F. Supp. 2d 716 (E.D. Wis. 2004) (for
purposes of motion to dismiss, prisoner stated
claim under § 1983 for violation of eighth and
fourteenth amendment rights; qualified immuni-
ty denied); *Hardage v. Francke*, 889 F.2d 1094
(Table) (9th Cir. 1989) (recognizing that once
habeas relief has been granted, prisoner whose
release date was miscalculated could have
claim for damages).

21 Dkt. #36, pp. 16-17. The defendants argue the fact that Miller
22 obtained a prior remedy through his *habeas* petition forecloses his
23 ability to maintain the current action. The above-cited cases
24 illustrate that exactly the opposite is true; indeed, Miller had to
25 succeed in his *habeas* action before his *Bivens* action could accrue.

26 Miller should be allowed to proceed with discovery to attempt
27 to determine the identities of Does 1-3. See *Gillespie*, 629 F.3d
28 at 642.

1 **3. Motion to dismiss any Tort Claims Act claim**

2 Miller has abandoned any Federal Tort Claims Act claim. Dkt.
3 #43, p. 2. Therefore, to the extent he may have alluded to any
4 such claim in his Amended Complaint, as the defendants suggest, the
5 claim should be dismissed.

6
7 **CONCLUSION**

8 For the reasons discussed above, I recommend Warden Thomas's
9 motion to dismiss the action against him on the basis of qualified
10 immunity be **granted**. I recommend the motion to dismiss Does 1-3 be
11 **denied**. And I recommend any claim against the United States under
12 the Federal Tort Claims Act be **dismissed**.

13
14 **SCHEDULING ORDER**

15 These Findings and Recommendations will be referred to a
16 district judge. Objections, if any, are due by **February 11, 2013**.
17 If no objections are filed, then the Findings and Recommendations
18 will go under advisement on that date. If objections are filed,
19 then any response is due by **February 28, 2013**. By the earlier of
20 the response due date or the date a response is filed, the Findings
21 and Recommendations will go under advisement.

22 IT IS SO ORDERED.

23 Dated this 22nd day of January, 2013.

24
25 /s/ Dennis J. Hubel

26 _____
27 Dennis James Hubel
28 Unites States Magistrate Judge